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Necessity of Objection in the Inferior Court as a Prerequisite to Seeking a Writ of Prohibition

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NECESSITY OF OBJECTION IN THE INFERIOR COURT AS A PREREQUISITE TO SEEKING A WRIT OF PROHIBITION.—There is much confusion among the cases of the different common-law jurisdictions as to the circumstances under which a writ of prohibition is appropriate. In many states it has been held that the superior court has a broad discretion, where the inferior court is exceeding its jurisdiction, either to issue the writ or to remand the petitioner to the inferior court to seek there some more or less adequate remedy.[1] Entirely distinct from this discretion, it is also said that the superior court has a further discretion as to whether it will issue the writ unless the petitioner has first raised objection in the lower court.[2] A perusal of the cases will show that these two different phases of discretion have been confused, and this confusion has doubtless augmented the notable lack of consistency between the decisions of the different states.

In one of the earliest West Virginia cases[3] dealing with the writ of prohibition, the Supreme Court of Appeals announced that it would grant the writ without objection having been urged in the lower court. Nevertheless, the court cautiously adds, that under proper circumstances, it would have a discretion to impose this prerequisite:

> "In some instances this Court might decline to act in application for a writ of prohibition till such a motion was made in the inferior court; for this writ is not granted *ex debito justitiae*, but is rather to be granted or withheld according to the circumstances of each particular case, and in the exercise of a sound judicial discretion."

The opinion in this case is based upon common-law principles. A distinction is made between those instances in which lack of jurisdiction in the lower court is apparent on the face of the record and those instances wherein lack of jurisdiction not appearing on the face of the record, must be brought to the court's attention by means of a plea. In the latter class of cases the court says, objection must have been made in the first instance in the lower court; in other instances a writ of prohibition will issue without such a prerequisite.

In 1882, not long after this decision was handed down, the following provision was added to section 1 of chapter 110 of the Code:

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1 32 Cyc. 613, *et seq.*; 22 R. C. L. § 8.
2 32 Cyc. 624; 22 R. C. L. § 27.
3 Swinburn *v.* Smith, 15 W. Va. 483, 499 (1879).

> "The writ of prohibition shall lie as a matter of right, in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers."

The evident intent of this addition to the statute is to limit, if not to abolish, the superior court's discretion with reference to granting or refusing the writ upon a presentation of facts showing that the lower court is exceeding its jurisdiction. A vital question for purposes of this discussion is the question whether the statute operates upon that second phase of discretion, as to the necessity of objection in the lower court as a prerequisite, hereinbefore mentioned. That it did abolish the discretion in the superior court as to compelling the petitioner to seek alternative remedies in the lower court seems to have been uniformly conceded in cases decided subsequently to enactment of the statute.

In view of the broad and emphatic language of the statute, it would seem rather remarkable that in any case coming up for decision after enactment of the statute the question of the superior court's power to demand the prerequisite under discussion could have been disposed of without referring to the possible, if not probable, effect of the statute. Yet in approximately a half-dozen cases handed down after enactment of the statute the question is decided without any reference to the statute. In *Board of Education* v. *Holt*,[4] it is said that the Supreme Court, "as an ordinary rule of practice, subject to just exception," will not award the writ until objection has been made in the lower court. The basis of the prerequisite is described by the court as "a matter of practice out of respect for the judge of the inferior tribunal." The prerequisite is again prescribed in *Knight* v. *Zahnhiser*,[5] where Judge Brannon, speaking for the court, says: "I grant that this is not jurisdictional; but it is, and ought to be, imperative practice." In *Jennings* v. *Judge*, [6] the writ was again refused because the petitioner had not raised objection to the jurisdiction in the first instance in the lower court. In an intervening case,[7] objection in the lower court was not required because it appeared to the Supreme Court that the lower court had acted with its eyes open. In the latter case, it is said that

[4] 51 W. Va. 435, 41 S. E. 337 (1902).
[5] 53 W. Va. 370, 44 S. E. 778 (1903).
[6] 56 W. Va. 146, 49 S. E. 23 (1904).
[7] Board of Education v. Holt, 54 W. Va. 167, 46 S. E. 134 (1903).

objection in the lower court "is only required as a matter of respect and courtesy to the circuit judge." Plainly, the Supreme Court decided that the lower court deserved no courtesy nor respect where it ought to know that it was exceeding its jurisdiction.

The question is discussed in these four cases in the light of common-law principles and no reference is made to the statute. While a discretion is still recognized in the superior court, it will be noted that the clear tendency is to exercise that discretion by way of insisting upon the prerequisite. In other words, to require it is the rule; to dispense with it, the exception.

After *Jennings* v. *Judge,* came a reaction against the previous comparatively strict requirement of the prerequisite. This reaction becomes stronger in each successive decision. First, the superior court's discretionary power to dispense with the prerequisite is emphasized.[8] Then the court, going back to its old original common-law doctrine, called attention to the fact that objection in the lower court will not be required when it appears on the face of the record that the lower court is exceeding its jurisdiction.[9] In *City of Charleston* v. *Littlepage,*[10] the court describes the rule requiring objection in the lower court as

> "A discretionary one of courtesy and deference to the court below, and does not apply if it appears in any manner that such court has acted deliberately or has considered the question of its jurisdiction and intends to proceed."

The plain tendency of these later decisions is to create a new rule out of the previous exception, and to relegate the old rule to the status of an exception to the new rule. Finally, in 1915, in *Weil* v. *Black,*[11] the court calls attention to the statute enacted in 1882 as granting the writ of prohibition as a *matter of right* and as leaving no discretion in the superior court to refuse the writ because objection has not been first raised in the lower court. The court says:

> "Indeed, in view of the statute, granting the writ, 'as matter of right,' we do not see how such a rule [requiring objection in the lower court as a prerequisite] can be justified in any case where it is proper to be issued at all."

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[8] Bice *v.* Boothsville Telephone Co., 62 W. Va. 521, 59 S. E. 501, 125 AM. ST. REP. 986 (1907).
[9] St. Marys *v.* Woods, 67 W. Va. 110, 67 S. E. 176 (1910). See note 3, *ante.*
[10] 73 W. Va. 156, 80 S. E. 131 (1913).
[11] 76 W. Va. 685, 86 S. E. 666 (1915).

In the later case of *Marsh* v. *O'Brien*,[12] the rule is thus broadly stated:

> "When a court is attempting to proceed in a cause without jurisdiction, prohibition lies, and the petitioner may apply to this court in the first instance, as matter of right for the writ."

This seems to be the current rule, and it will be noted that it is stated without exceptions. These later decisions seem, in effect, to overrule the earlier decisions which say that the superior court has a discretion to require objection in the lower court as a prerequisite to seeking the writ. It is believed that the new rule is the better one. It is in accord with the general purport, if not with the plain intent of the statute. It conduces to certainty in the procedure. There may arise instances where it would be difficult to estimate whether the superior court would be inclined to show any "courtesy and respect" to the inferior court, and yet a litigant's interests would suffer by delay. The remedy is extraordinary, arbitrary and generally resorted to in the face of an emergency. Moreover, it should not be forgotten that, in granting the writ, the superior court is exercising its original, not its appellate, jurisdiction. The proceedings upon application for the writ are in no sense a continuation of the proceeding to be inhibited. A motion for a new trial and motions to correct by virtue of chapter 134 of the Code as prerequisites to appellate relief, bear no analogy to objection in the lower court as a prerequisite to issuing a writ of prohibition, simply because the latter does not grant appellate, but original, relief.

—L. C.

[12] 82 W. Va. 508, 96 S. E. 785 (1918). The latest announcement of the rule is State *ex. rel.* Constanzo *v.* Kindelberger, 106 S. E. 434 (W. Va. 1921).